2-4-2010

Wanner v. State, Dept. of Transportation Appellant's Brief Dckt. 37059

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVE M. WANNER, Petitioner/Respondent, vs. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent/Appellant.	)	Case No. 37059-2009

APPELLANT'S BRIEF

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Franklin

Honorable David C. Nye, District Judge

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I.
STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves an administrative license suspension ("ALS") arising from I.C. §18-8002A.

B. STATEMENT OF FACTS

Steve M. Wanner ("Wanner"), whom has both commercial and non-commercial vehicle driving privileges[1], pursuant to his commercial drivers license ("CDL")[2] issued by the Idaho Department of Transportation ("IDOT"), was operating a non-commercial vehicle on August 7, 2008 when he was arrested for allegedly driving under the influence of alcohol and/or drugs ("DUI"). *R.*, pp. 17-19. Following his arrest, the arresting officer requested Wanner to submit to toxicology testing, pursuant to I.C. §§ 18-8002 and 18-8002A. *R.*, pp. 14, 18. Wanner was read and had explained to him the Notice of Suspension for Failure of Evidentiary Testing (Advisory for §§ 18-8002 and 18-8002A, Idaho Code) ("Notice of Suspension Form"). *Id.*

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[1]Idaho Code §49-105(16)(d) describes a Class D drivers license as a license "that shall be issued and valid for the operation of a motor vehicle that is not a commercial vehicle as defined in section 49-123, Idaho Code." IDAHO CODE § 49-105(16)(d).

[2]Idaho Code §49-105(16)(a) describes a Class A commercial driver's license as a license that "shall be issued and valid for the operation of any combination of motor vehicles with a manufacturer's gross combination weight rating (GCWR) in excess of twenty-six thousand (26,000) pounds, provided the manufacturer's gross vehicle weight rating (GVWR) of the vehicle(s) being towed is in excess of ten thousand (10,000) pounds. Persons holding a valid class A license may also operate vehicles requiring a class B,C or D license." IDAHO CODE 49-105(16)(a). Wanner has a Class A CDL. *R.*, pp. 14, 24.

Following the arresting officers reading and explaining of the Notice of Suspension Form, Wanner agreed to submit to two breath tests on the Intoxilyzer 5000. *Id.* The results of the breath tests showed Wanner's BAC to be 0.094 and 0.090.[3] *R.*, p. 16. Following Wanner's failure of the breath tests, the arresting officer then provided Wanner a copy of the Notice of Suspension Form, for which Wanner signed. *R.*, p. 14. On August 13, 2008, the arresting officer forwarded the Notice of Suspension form and his accompanying paperwork, test results and sworn statement to the Idaho Department of Transportation ("IDOT"). *R.*, p. 22.

On or about August 21, 2008, fourteen (14) days after his arrest, Wanner, through counsel, submitted his request for an administrative hearing pursuant to "I.C. §18-8002A".[4] *R.*, pp. 5-6. On or about August 22, 2008 IDOT provided Wanner notice that his request for an administrative hearing pursuant to I.C. §18-8002A was denied because it was filed beyond the seven (7) day deadline contained in the statute. *R.*, p. 4.

C. COURSE OF PROCEEDINGS BELOW

On or about the 18th day of September, 2008 Wanner timely filed his Notice of Petition for Judicial Review of Administrative Order and Request for Stay of License Suspension. *R.*, pp. 1-3.

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[3]The legal limit of blood alcohol content ("BAC") for individuals operating non-commercial vehicles is 0.08. IDAHO CODE 18-8004(1)(a). The legal limit of BAC for individuals operating commercial vehicles is 0.04. IDAHO CODE 18-8004(1)(b).

[4]In Wanner's Request For Administrative Hearing he wrote, "Notice is hereby given, pursuant to I.C. §18-8002A that Steve M. Wanner, UG257658F, requests an administrative hearing on the validity of the suspension of his license." *R.*, p. 5.

On September 19, 2008 an order staying the suspension of Wanner's driving privileges was signed. *R.*, p. 30.

On January 13, 2009 IDOT filed its motion and accompanying memorandum, seeking dismissal of Wanner's petition for judicial review due to Wanner's failure to timely request an administrative hearing pursuant to I.C. § 18-8002A. *R.*, pp. 47-55. On February 23, 2009 the district court entered its decision, denying IDOT's motion to dismiss. *R.*, pp. 56-58.

On or about March 30, 2009 Wanner filed his opening brief with the district court. *R.*, pp. 62-73. In his brief, Wanner conceded that the arresting officer read and explained the Notice of Suspension Form to him and also provided him with a copy of the Notice of Suspension Form, which he signed. *R.*, pp. 63-65. After receiving his copy of the Notice of Suspension Form, Wanner did review the Notice of Suspension Form and acknowledged that he did have notice that if he wanted an administrative hearing, he had to request it within seven (7) days from the date of the notice of suspension. *R.*, pp. 64-65. Wanner chose not to request a hearing within the seven (7) day period based upon his own belief that he could live with the 90 day suspension of his driving privileges. *R.*, pp. 64-65; *Tr.* p. 4, LL. 10-21.

On July 2, 2009 oral argument was held before the district court relative to Wanner's Petition for Judicial Review. *R.*, pp. 94-95. On July 31, 2009 the district court entered its Decision on Appeal From Administrative Hearing. *R.*, pp. 104-108. In its July, 31, 2009 decision, the court ruled that Wanner had not received adequate due process notice of the consequences for failing the evidentiary test as it relates to his commercial driving privileges and as such, he was entitled to an

administrative hearing. *R.*, pp. 107-108. The court further held that had the Notice of Suspension Form included the consequences as detailed in I.C. §49-335(2), i.e. that Wanner's CDL would be suspended for one year, that Wanner would have timely requested an administrative hearing. *R.*, p. 107.

On September 2, 2009 IDOT filed its Petition for Rehearing with the district court. *R.*, pp. 112-113. The basis for the Petition for Rehearing was for clarification purposes. IDOT could not determine from the district court's decision whether Wanner's non-commercial driving privileges should be suspended pursuant to I.C. §18-8002A since Wanner's petition for judicial review arose from IDOT's denial of allowing Wanner to have an administrative hearing pursuant to I.C. §18-8002A. In its petition, IDOT acknowledged that should Wanner's commercial driving privileges become suspended, then he was still entitled to an administrative hearing pursuant to I.C. §49-326(4). *R.*, pp. 112-113.

On September 9, 2009 a hearing was held on IDOT's Petition for Rehearing. *R.*, p. 114. On September 10, 2009 the district court entered its Amended Decision on Appeal From Administrative Hearing. *R.*, pp. 116-121. In its amended decision, the district court ruled that the Notice of Suspension Form was clear as to "regular" licensed drivers operating non-commercial vehicles. *R.*, p. 118. However, the court held that the Notice of Suspension Form was vague as to CDL licensed drivers operating non-commercial vehicles because it did not contain the penalties as detailed in I.C. §49-335(2), specifically, that CDL holders are disqualified from operating a commercial motor

vehicle for a period of one year if they fail a test to determine a driver's alcohol, drug or other intoxicating substances concentration while operating a motor vehicle. *R.*, pp. 119-120.

Due to the Notice of Suspension form not containing the provisions of I.C. §49-335(2), the court held that due process had been violated and that Wanner was entitled to an administrative hearing. *R.*, p. 120. Furthermore, the court held that a hearing pursuant to I.C. §49-326(4) was meaningless unless it covered I.C. §18-8002 and I.C. §18-8002A issues, thus Wanner is entitled to an administrative hearing pursuant to I.C. §18-8002, I.C. §18-8002A and I.C. §49-326(4). *R.*, pp. 120-121. IDOT timely filed its Notice of Appeal of the district court's decision. *R.*, pp. 122-126.

II.
ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in its determination that Wanner is entitled to an administrative hearing on his non-commercial driving privileges pursuant to I.C. §18-8002 and/or I.C. §18-8002A?

2. Whether the district court erred in its determination that the Notice of Suspension Form violated Wanner's due process rights.

III.
STANDARD OF REVIEW

Because this is an administrative appeal, the Idaho Administrative Procedure Act applies (IDAPA). IDAPA requires the appealing party (Wanner) to first show that IDOT erred in a manner as described in I.C. § 67-5279(3). *Lane Ranch P'ship v. City of Sun Valley*, 144 Idaho 584, 590, 166 P.3d 374, 380 (2007). Idaho Code § 67-5279(3) states that courts performing judicial reviews of

agency decisions "shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) not supported by substantial evidence on the record as a whole; or

(e) arbitrary, capricious, or an abuse of discretion."

IDAHO CODE 67-5279(3).

After establishing at least one of the above violations, the appealing party (Wanner) must then show that the hearing officer's error prejudices the appellant's substantial rights as required by I.C. § 67-5279(4). *Lane Ranch P'ship,* 144 Idaho at 590, 166 P.3d at 380. If the appealing party ultimately prevails, the order is "set aside in whole or in part and the case remanded." *Haw v. Idaho State Bd. of Med.*, 140 Idaho 152, 157, 90 P.3d 902, 907 (2004).

"On appeal from a decision rendered by the district court while acting in its appellate capacity under IDAPA, this Court directly reviews the district court's decision." *Dry Creek Partners, LLC v. Ada County Comm'rs*, __ Idaho __, 217 P.3d 1282, 1287 (2009).

IV.
ARGUMENT

A. WANNER IS NOT ENTITLED TO AN ADMINISTRATIVE HEARING PURSUANT TO I.C. §18-8002[5] AND I.C. §18-8002A.

The District Court Should Be Reversed Because Wanner Did Not Exhaust His Administrative Remedies. Wanner failed to timely request an administrative hearing pursuant to I.C. §18-8002A, thus the suspension of his non-commercial or Class D driving privileges, imposed by IDOT, should be affirmed. Idaho Code § 18-8002A states in part:

> (2) Information to be given. At the time of evidentiary testing for concentration of alcohol, or for the presence of drugs or other intoxicating substances is requested, the person shall be informed that if the person refuses to submit to or fails to complete evidentiary testing, or if the person submits to and completes evidentiary testing and the test results indicate an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code, the person shall be informed substantially as follows (but need not be informed verbatim):
>
> If you refuse to submit to or if you fail to complete and pass evidentiary testing for alcohol or other intoxicating substances:
>
> (a) The peace officer will seize your driver's license and issue a notice of suspension and a temporary driving permit to you, but no peace officer will issue you a temporary driving permit if your driver's license or permit has already been and is suspended or revoked. No peace officer shall issue a temporary driving permit to a

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[5]Idaho Code §18-8002 pertains largely in part to penalties and suspensions arising from the refusal of a motor vehicle operator to submit to evidentiary/toxicology testing when requested by a law enforcement officer who has reasonable suspicion to believe that the operator was operating a motor vehicle while under the influence of alcohol, drugs or other intoxicating substances. See generally IDAHO CODE §18-8002. Idaho Code §18-8002A pertains largely in part to the penalties and administrative procedures associated with and provided to the operator of a motor vehicle who submitted to and failed evidentiary/toxicology testing. See generally IDAHO CODE § 18-8002A. In this case, Wanner submitted to and failed evidentiary/toxicology testing.

driver of a commercial vehicle who refuses to submit to or fails to complete and pass an evidentiary test;

(b) You have the right to request a hearing within seven (7) days of the notice of suspension of your driver's license to show cause why you refused to submit to or to complete and pass evidentiary testing and why your driver's license should not be suspended;

. . .

(d) If you complete evidentiary testing and fail the testing and do not request a hearing before the department or do not prevail at the hearing, your driver's license will be suspended. This suspension will be for ninety (90) days if this is your first failure of evidentiary testing, but you may request restricted noncommercial vehicle driving privileges after the first thirty (30) days. The suspension will be for one (1) year if this is your second failure of evidentiary testing within five (5) years. You will not be able to obtain a temporary restricted license during that period;

. . .

(4) Suspension.

(a) Upon receipt of the sworn statement of a peace officer that there existed legal cause to believe a person had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol, drugs or other intoxicating substances and that the person submitted to a test and the test results indicated an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code, the department shall suspend the person's driver's license, driver's permit, driving privileges or nonresident driving privileges:

(i) For a period of ninety (90) days for a first failure of evidentiary testing under the provisions of this section. The first thirty (30) days of the suspension shall be absolute and the person shall have absolutely no driving privileges of any kind. Restricted noncommercial vehicle driving privileges applicable during the remaining sixty (60) days of the suspension may be requested as provided in subsection (9) of this section.

(ii) For a period of one (1) year for a second and any subsequent failure of evidentiary testing under the provisions of this section within the immediately preceding five (5) years. No driving privileges of any kind shall be granted during the suspension imposed pursuant to this subsection.

The person may request an administrative hearing on the suspension as provided in subsection (7) of this section. ***Any right to contest the suspension shall be waived if a hearing is not requested as therein provided.***

. . .

(7) Administrative Hearing on Suspension.

A person who has been served with a notice of suspension after submitting to an evidentiary test may request an administrative hearing on the suspension before a hearing officer designated by the department. ***The request for a hearing shall be in writing and must be received by the department within seven (7) calendar days of the date of service upon the person of the notice of suspension***, and shall include what issue or issues shall be raised at the hearing. The day on which the request was received shall be noted on the face of the request."

IDAHO CODE § 18-8002A (emphasis added).

IDAPA Rule 39.02.72 - Rules Governing Administrative License Suspensions, is also applicable.

> Hearing requests must be received by the Department no later than 5 p.m. of the seventh day following the service of the Notice of Suspension. Hearing requests received after that time shall be considered untimely. ***The Department shall deny an untimely hearing request unless the petitioner can demonstrate that a request should be granted.***

IDAPA Rule 39.02.72, 100.02 (emphasis added).

Wanner's failure to timely request an administrative hearing pursuant to I.C. §18-8002A and IDOT's refusal to allow him to have an administrative hearing due to his untimely request is wholly statutory and jurisdictional, thus negating the district court's authority to allow Wanner to have an administrative hearing. "Actions of state agencies or officers or actions of a local government, its officers or its units are not subject to judicial review unless expressly authorized by statute." IRCP 84(a). "Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant." *Cobbley v. City of Challis*, 143 Idaho 130, 133, 139 P.3d

732, 735 (2006). "It therefore goes almost without saying that if the exclusive and otherwise unavailable method is set forth in the provided-for judicial review procedures, one cannot challenge in a separate civil suit the action of a board where that board has acted on matters within its jurisdiction." *Id.* at 134, 139 P.3d at 736.

In this case, I.C. §18-8002A(4) is explicit in its verbiage that *any right to contest the suspension pursuant to I.C. §18-8002A shall be deemed waived* if a hearing is not requested within the statutory allotted seven (7) days. This statutory mandate negates Wanner's ability to have an administrative hearing pursuant to I.C. §18-8002A since Wanner's right to have an administrative hearing does not rise unless he exhausts his administrative remedies and timely requests an administrative hearing within the seven (7) day requirement. Prior to seeking judicial review, Wanner must have first exhausted all of his administrative remedies. IDAHO CODE 67-5271; *Nation v. State, Dept. of Corr.*, 144 Idaho 177, 193, 158 P.3d 953, 969 (2007)(Before a court can hear an appeal from an agency adjudication, the litigant must first exhaust the administrative remedies made available to him.). If Wanner had timely filed his request, the procedure and standard of review would be governed by I.C. §18-8002A(7). However, Wanner failed to exhaust his administrative remedies by failing to request an administrative hearing in a timely fashion.

Pursuant to I.C. §18-8002A(4), Wanner had to have requested his administrative hearing within seven (7) days of the date on the Notice of Suspension form. Because he did not, Wanner waived his right to contest the suspension as detailed in I.C. §18-8002A(4) and I.C. §18-8002A(7). The arresting officer read, explained and personally served the Notice of Suspension Form to

Wanner on August 7, 2008. As is reflected by the Administrative Record, Wanner did not request an administrative hearing, pursuant to I.C. §18-8002A, until August 21, 2008, fourteen (14) days later and well outside the statutory required period of time of seven (7) days.

Furthermore, when Wanner did finally request an administrative hearing, he did not provide the IDOT any explanation or basis whatsoever for the untimeliness of his hearing request. See *R.*, pp. 5-6. Because of his untimely request and his failure to provide an explanation or basis for his untimeliness, as contemplated and allowed by IDAPA Rule 39.02.72. 100.02, IDOT appropriately rejected Wanner's request for an administrative hearing pursuant to I.C. §18-8002A.

Due to Wanner's failure to timely request an administrative hearing, as well as his failure to describe the basis for his untimely request for a hearing, he has waived, pursuant to the plain language of the statute and IDAPA rules, any right to contest the suspension that has been imposed by the IDOT pursuant to I.C. §18-8002A. Wanner failed to exhaust his administrative remedies by failing to timely file his petition for an administrative hearing within the time limits prescribed by I.C. § 18-8002A. The time limits prescribed by I.C. §18-8002A are jurisdictional, warranting a dismissal of Wanner's request for an administrative hearing pursuant to I.C. §18-8002A.

B. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT THE NOTICE OF SUSPENSION FORM DENIED WANNER DUE PROCESS.

1. Wanner Had Adequate Notice Of The Potential Consequences For Failure Of Evidentiary Testing.

The essence of Wanner's argument and the district court's decision warranting him the relief he seeks is that the Notice of Suspension Form read to him did not provide him adequate notice

regarding the suspension of his commercial driving privileges. *R.*, pp. 69-70, 120. Wanner's self rationalization, interpretation of the Notice of Suspension Form and ignorance of the law does not provide him an escape route from the laws and rules that he must abide by. The law presumes individuals have knowledge of the laws under which they are governed and must abide by.

> Our entire legal system is based upon the principle that persons are charged with constructive knowledge of the statutes and laws. Property owners are bound and often deprived of property by encumbrances shown in the real estate records. Criminals are bound and often deprived of their liberty by violations of the criminal statutes of which they had no personal knowledge. Tortfeasors are bound and often deprived of property by violations of both statutes of which they had no knowledge, and the common law which may not have been "discovered" by the courts until that case, and then perhaps on appeal. ***In none of these cases does procedural due process allow a defense or complaint based upon ignorance of the law or upon the government's failure to take reasonable steps to inform the public of the substance of the statutes.***

Powers v. Canyon County, 108 Idaho 967, 970, 703 P.2d 1342, 1345 (1985)(Internal citations omitted.)(emphasis added).

Idaho Code §18-8002, Idaho's implied consent statute, states in part:

> (1) Any person who drives or is in actual physical control of a motor vehicle in this state *shall be deemed to have given consent* to evidentiary testing for concentration of alcohol as defined in section 18-8004, Idaho Code, and to have given his consent to evidentiary testing for the presence of drugs or other intoxicating substances . . .

IDAHO CODE 18-8002. See also *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007)("In Idaho 'any person who drives or is in actual physical control' of a vehicle impliedly consents to evidentiary testing for alcohol at the request of a peace officer with reasonable grounds for suspicion of DUI.")

Commercial driver's license holders in Idaho are governed, in part, by Idaho Code § 49-335, which relates to disqualifications and penalties of commercial driver's licenses. Specifically, regarding the notice issues regarding the failure of evidentiary testing, the statute reads:

> (2) Any person who operates a commercial motor vehicle or who holds a class A, B or C driver's license is disqualified from operating a commercial motor vehicle for a period of not less than one (1) year if the person refuses to submit to or submits to and fails a test to determine the driver's alcohol, drug or other intoxicating substances concentration while operating a motor vehicle.

IDAHO CODE § 49-335(2).

This suspension can be appealed to the IDOT as described in I.C.§ 49-326(4). Pursuant to I.C. § 49-330, a petition for judicial review of the department's decision, too, may be filed. However, prior to seeking judicial review, and as discussed previously above, Wanner must first exhaust all of his administrative remedies.

The Notice of Suspension Form reviewed by the arresting officer and provided to Wanner detailed the notice requirements that are statutorily imposed to be provided to an individual prior to being asked to submit to evidentiary testing pursuant to I.C. §18-8002 and I.C. §18-8002A. Idaho law mandates strict adherence to the language of I.C. § 18-8002. "This Court has previously held that the information required by I.C. § 18-8002 is set forth 'in no uncertain terms,' and that our Supreme Court has 'emphatically discountenanced interjection of judicial gloss upon the legislature's license suspension scheme.'" *Virgil v. State*, 126 Idaho 946, 947, 895 P.2d 182, 183 (Ct. App. 1995)(internal citations omitted).

A close reading of the Notice of Suspension Form read/played to Wanner reveals first, in paragraph 4(B) that if an individual refuses to submit to evidentiary testing, the temporary permit that is given (if eligible) does not provide for commercial driving privileges of any kind. *R.*, pp. 14-15. A temporary permit cannot be given because the separate law controlling commercial driver's licenses, i.e. I.C. §49-335(2), does not allow for it and this statement clarifies any ambiguity that may be raised because of the controlling, mandatory language of I.C. §49-335(2). Second, in paragraph 5(A), the individual who submits to evidentiary testing is told that any temporary permits given do not allow an individual to operate a commercial vehicle. *R.*, pp. 14-15. Once again, this is due to the controlling language of I.C. §49-335(2) as it pertains to commercial driving privileges suspensions. In paragraph 5(B), the individual who submits to evidentiary testing and later requests and obtains restricted driving privileges is told, yet once again, that the restricted driving privileges do not allow for the operation of a commercial motor vehicle. *R.*, pp. 14-15. As previously stated, this is due to the controlling language in I.C. §49-335(2) which already covers the notice requirements for commercially licensed drivers regarding evidentiary testing and the potential ramifications of either refusing to submit to or failing evidentiary testing.

Pursuant to I.C. §18-8002A(2), the operator of a motor vehicle need not be informed verbatim, rather, he need only to be "substantially" informed of the information contained in section 2. IDAHO CODE 18-8002A(2); *Halen v. State*, 136 Idaho, 829, 834, 41 P.3d 257, 262 (2002). Wanner does not dispute that the Notice of Suspension Form was read to him, nor does he dispute that he was provided the information as required by I.C. §18-8002 and I.C. §18-8002A. Rather,

Wanner contends that the Notice of Suspension Form is defective due to it failing to notify him of the consequences to his commercial driving privileges as detailed in I.C. §49-335(2), even though he was operating a non-commercial vehicle.

The Notice of Suspension Form read to Wanner was statutorily sufficient, even though Wanner has a CDL and was operating a non-commercial vehicle. Idaho Code §18-8002A(2) mandates the information that must be given prior to an administrative suspension pursuant to I.C. §18-8002A can be imposed. Nothing within the statute requires that operators of motor vehicles be notified that a failure of evidentiary testing will result in the suspension or disqualification of a CDL holder from operating a commercial vehicle for one (1) year. Whether all of the potential consequences for failing or refusing to submit to toxicology testing must be provided prior to a suspension can be entered has not been addressed by Idaho's appellate courts. However, an analysis made by Wyoming's Supreme Court is instructive on this notice issue.[6]

In *Escarcega v. Wyoming Department of Transportation*, 153 P.3d 264 (Wyo. 2007), the Wyoming Supreme Court addressed a similar notification issue to CDL holders, though in the context of a refusal to submit to evidentiary testing. Both Idaho and Wyoming have substantially similar implied consent statutes and both states have substantially similar statutory mandates that

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[6]On January 13, 2010 the Honorable Jeff M. Brudie, Idaho District Court Judge in the Second Judicial District, entered his Memorandum Opinion and Order on Petition for Judicial Review in Nez Perce County case number CV09-01585. In part, his decision relied upon *Escarcega v. Wyoming Department of Transportation*, 153 P.3d 264 (Wyo. 2007). Judge Brudie addressed the notice and due process questions which are similarly posed in this appeal. A true and correct copy of Judge Brudie's decision is submitted herewith as Exhibit A.

require what information must be provided to the operators of motor vehicles whom are requested to submit to evidentiary/toxicology testing. See Ex. A, *Mem. Op. and Order on Pet. for Judicial Review*, p. 14-15, n. 18.

In *Escarcega*, Escarcega (like Wanner) was a CDL holder who was arrested for DUI while operating a non-commercial motor vehicle. *Id.* at 15; *Escarcega*, 153 P.3d at 266. The arresting officer informed Escarcega of the statutory notification requirements relative to his refusal to submit to or his failure of evidentiary testing. *Id.* Similar to Idaho's Notice of Suspension Form, Escarcega was not advised of the consequences to his CDL should he fail or refuse to submit to evidentiary testing. *Id.* Escarcega refused evidentiary testing and *timely requested an administrative hearing*, arguing that his commercial driving privileges should not be suspended since the officer did not provide him notice of the consequences of refusing, to his commercial driving privileges. *Id.*; *Escarcega*, 153 P.3d at 267. The administrative hearing officer upheld the suspension, as did the district court and Escarcega appealed to the Wyoming Supreme Court. *Id.*

In upholding the suspension imposed against Escarcega, the Wyoming Supreme Court found there was no ambiguity in the statute mandating the specific warnings to be given and the Court further found that the legislature did not choose to require warnings regarding potential commerical driving privilege disqualifications. The Court wrote:

> It would be impractical to require that an arresting officer convey all the information in both statutory schemes[7] to an arrestee before requesting a specimen for chemical testing. The implied consent and various driver's license statutes contain multiple interrelated provisions for penalties that may be heightened or vary according to the circumstances of each violation. To require a detailed recitation of all statutory penalties involved in a traffic stop would be a misuse of law enforcement resources and would not serve the purpose of the implied consent statutes. The implied consent law was intended as a complement to the DWUI[8] statute and was designed to facilitate tests for intoxication, not to inhibit the ability to keep drunk drivers off the road. (Internal citation omitted).
>
> Implied consent is, by nature, *implied* in law. Merely by choosing to drive a motor vehicle on the roads of this state, a driver agrees to submit to chemical testing in the event of his arrest for DWUI. The consequences for refusing [or failing] a chemical test are published law, of which every citizen is presumed to have knowledge. *See Cheek v. United States*, 498 U.S. 192, 199, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991). The Legislature has created a few limited exceptions to that rule by requiring that specific warnings be given to drivers in certain situations before penalties can be imposed. *Appellant here was given the precise warning required by the applicable statutes for a driver stopped in a non-commercial vehicle. He was entitled to no more and no less.*

Id. at 15-16; *Escarcega*, 153 P.3d at 270.

Like Wyoming, Idaho's DUI statutes contain "multiple interrelated provisions for penalties that may be heightened or vary according to the circumstances of each violation." See Ex. A, *Mem. Op. and Order on Pet. for Judicial Review*, p. 16. Idaho Code §18-8005 pertains to penalties relating to DUI. This statute also refers to suspensions imposed by I.C. §49-335. Similar to Wyoming,

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[7]Wyoming has two implied consent statutes, one for drivers of commercial vehicles and one for drivers of non-commercial vehicles. See Ex. A, *Mem. Op. and Order on Pet. for Judicial Review*, pp. 14-15., n. 18.

[8]Wyoming uses the acronym DWUI for driving under the influence as compared to DUI for Idaho.

Idaho's legislature, too, opted not to reference I.C. §49-335 within the mandatory notice provisions as detailed in I.C. §18-8002A(2). In response to *Escarcega*, the district court for the Second Judicial District wrote:

> This Court finds the reasoning of the Wyoming Court sound. Idaho's legislature set forth in I.C. §18-8002A(2)(sic) the specific consequences a driver must be informed about prior to a law enforcement officer's request that a driver perform evidentiary testing subject to a DUI arrest. While the notification may not cover all potential consequences of refusing to submit to evidentiary testing or of failing evidentiary testing, it is all that Idaho's legislature has required, no more and no less. If this Court found that more was required than has been set forth by the legislature, barring a constitutional ground, it would be tantamount to the Court making law. Courts have the power to interpret law, not to make law. The power to make law rests instead with the legislature. *Electrical Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 825, 41 P.3d 242, 253 (2001).

See Ex. A, *Mem. Op. and Order on Pet. for Judicial Review*, p. 16.

The commercial driving privileges suspension imposed by I.C. §49-335(2) is totally separate and apart from the suspension imposed by I.C. §18-8002A. Had the officer failed to read the Notice of Suspension Form, Wanner would have still been facing a potential suspension of his non-commercial driving privileges pursuant to the penalties as detailed I.C. §18-8005, as well as the suspension of his commercial driving privileges as detailed in I.C. § 18-8005(2)(b) and I.C. §49-335(2). Wanner, *at a minimum*, pursuant to I.C. §18-8002, had impliedly given consent to submit to evidentiary testing when he operated a motor vehicle on an Idaho roadway. Furthermore, Wanner had *at-least* constructive knowledge and notice, pursuant to I.C. §18-8005 that his driving privileges could potentially be suspended and even more specifically, in accordance with I.C. §18-8005 and

I.C. §49-335(2), that if he failed evidentiary testing, his commercial driving privileges would be suspended for one (1) year.

Wanner cannot claim ignorance of the law as to these statutory provisions, notice and requirements. Sufficient notice of the suspensions were provided to Wanner and there is no argument from him that the required notices were not provided to him. Wanner failed to exhaust his administrative remedies by timely requesting an administrative hearing. Additionally, the statutorily imposed time limits to request an administrative hearing required by I.C. §18-8002A are jurisdictional and were not met by Wanner. Because I.C. §18-8002A(2) does not require notification of the penalties as provided in I.C. §49-335(2), Wanner cannot sustain his claim that he had not been adequately notified of the suspension pertaining to his commercial driving privileges.

2. Wanner's Constitutional Due Process Rights Have Not Been Violated.

In this matter Wanner argued, and the district court agreed, that constitutional due process requires that Wanner should have been given notice of the full consequences of failing evidentiary testing. *R.*, p. 120. Courts must consider three factors in procedural due process challenges:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In re Driver's License Suspension of Gibbar, 143 Idaho 937, 946, 155 P.3d 1176, 1185 (Ct. App. 2006) citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The Idaho Supreme Court has held that the state has a strong interest in preventing intoxicated persons from driving, as well as a strong interest in the driver's right to a prompt post-suspension hearing under the statute then in effect to challenge the suspension. See *Gibbar*, 143 Idaho at 946, 155 P.3d 1176 at 1185 citing *State v. Ankey*, 109 Idaho 1, 4-5, 704 P.2d 333, 336-37 (1985). In *In re Driver's License Suspension of McNeely*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990), a motor vehicle operator claimed his procedural due process rights were violated when he was not allowed to choose the type of evidentiary test he would be subjected to. The Court of Appeals held, "Even though a licensee's interest in maintaining his or her license for employment purposes is substantial, we feel it must be subordinated to the state's interest in preventing intoxicated persons from driving on Idaho's highways, especially where the individual is entitled to post-suspension review procedures." *McNeely*, 119 Idaho at 191, 804 P.2d at 920.

> "Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions." *Cowan v. Board of Comm'rs*, 143 Idaho 501, 510, 148 P.3d 1247 (2006). "[A]n individual must be provided with notice and an opportunity to be heard." *Spencer v. Kootenai County*, 145 Idaho 448, 454, 180 P.3d 487, 493 (2008). Due process is not a rigid concept. Instead, the protections and safeguards necessary vary according to the situation. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999).

See Ex. A, *Mem. Op. and Order on Pet. for Judicial Review*, p. 18 citing *Meyers v. Hansen*, ___ Idaho ____, 221 P.3d 81 (2009).

The thrust of Wanner's complaint is that had the Notice of Suspension Form advised him of the suspension of his commercial driving privileges pursuant to I.C. §49-335(2), then he would have

requested an administrative hearing pursuant to I.C. §18-8002A. The suspension imposed in accordance with I.C. §18-8002A does not pertain to Wanner's commercial driving privileges, but to his ability to operate non-commercial vehicles. Wanner readily admits he planned on just living with the I.C. § 18-8002A suspension and made a decision not to request an administrative hearing. *R.*, pp. 63-65; *Tr.* p. 4, LL. 10-21.

The suspension to be or that may be imposed on Wanner's commercial driving privileges for his failure of evidentiary testing, is in accordance with I.C. §49-335. The state has a strong, substantial interest in regulating the drivers licenses of those who are licensed CDL holders and preventing them from driving the commercial vehicles they may operate while under the influence of intoxicating substances. Commercial vehicle operators generally drive larger vehicles, with much heavier loads, and, in the case of buses or large vans, with many more occupants than passenger automobiles.

In instances such as this matter, CDL holders are provided the opportunity to have administrative hearings regarding the suspension of their driving privileges pursuant to I.C. §18-8002, I.C. §18-8002A and I.C. §49-326(4). Idaho Code §49-326(4) provides for administrative hearings to be made available to those who have been disqualified or suspended pursuant to I.C. §49-335(2). As discussed herein above, I.C. § 49-335(2) pertains to the suspension of commercial driving privileges. Idaho Code §49-326(4) does not have a time limitation on it when an administrative hearing may be had, though it does require that IDOT notify the licensed individual in writing of the suspension. In this case, the record is void of any notifications to Wanner from

IDOT regarding the suspension of his commercial driving privileges because this case arises from Wanner's request for an administrative hearing pursuant to I.C. §18-8002A, which pertains to non-commercial driving privileges. *R.*, pp. 5-6. Any license suspension imposed on Wanner's commercial driving privileges would be handled in a I.C. §49-326(4) administrative hearing, should he request it, which, as discussed above, is separate and apart from the I.C. §18-8002A suspension.

Wanner was provided notice of the I.C. §18-8002A suspension, which he chose not to request an administrative hearing on said suspension. Should Wanner's commercial driving privileges be suspended or disqualified, then IDOT is required to provide him notice of said suspension or disqualification. Pursuant to said notice, Wanner is then provided the opportunity for an administrative hearing pursuant to I.C. §49-326(4). Because Wanner is required to receive notice pursuant to I.C. §49-326(4) relative to a suspension or disqualification of his commercial driving privileges pursuant to I.C. §49-335(2), and he is given the opportunity for a hearing relative to the suspension of his commercial driving privileges, his due process rights have not been violated relative to the Notice of Suspension Form failing to advise him of the I.C. §49-335(2) consequences.

Wanner's substantive due process rights and equal protection rights under the constitution have not been violated, either.

> Substantive due process, as guaranteed by both the United States and Idaho Constitutions, embodies the requirement that a statute bear a reasonable relationship to a permissible legislative objective. *McNeely*, 119 Idaho at 189, 804 P.2d at 918; *State v. Reed*, 107 Idaho 162, 167, 686 P.2d 842 at 842, 847 (Ct. App. 1984). When legislation involves social or economic interests, it may deprive a person of life, liberty or property only if it has a rational basis–that is, the reason for the deprivation may not be so inadequate that it may be characterized as arbitrary.

Gibbar, 143 Idaho at 950, 155 P.3d at 1189 (internal citations omitted).

Wanner cannot argue that there is not a rational basis for the state to suspend or disqualify a driver holding a CDL when said individual fails evidentiary testing. Because there is a rational basis for the state to keep its highways clear of intoxicated and impaired drivers, it cannot be said that Wanner's substantive due process rights pertaining to his commercial driving privileges have been violated, either.

V.
CONCLUSION

This Court should hold Wanner is not entitled to a hearing on his non-commercial driving privileges pursuant to I.C. § 18-8002A since he did not exhaust his administrative remedies and he failed to timely request a hearing. Furthermore, this Court should reverse the district court's Amended Decision and hold that the Notice of Suspension Form did not violate Wanner's constitutional due process rights. The stay imposed on the suspension of Wanner's driving privileges should be lifted and the suspension imposed.

DATED this 2 day of February, 2010.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
STEPHEN J. MUHONEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of February, 2010, I served two (2) true and correct copies of the above and foregoing document to the following person(s) as follows:

Gregory C. May
MAY, RAMMELL & THOMPSON, CHTD.
P. O. Box 370
Pocatello, Idaho 83204-0370

[✓] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Facsimile

STEPHEN J. MUHONEN

EXHIBIT A

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

In the Matter of the Driving Privileges of	CASE NO. CV09-01585
DAVID B. GHIGLERI,	MEMORANDUM OPINION AND ORDER ON PETITION FOR JUDICIAL REVIEW
Petitioner.	

This matter came before the Court on Petition for Judicial Review of the Idaho Transportation Department Hearing Officer's Order sustaining David B. Ghigleri's Administrative License Suspension pursuant to I.C. § 18-8002A. A hearing on the matter was held on December 3, 2009. Petitioner Ghigleri was represented by attorney Charles M. Stroschein. The Idaho Transportation Department was represented by Edwin L. Litteneker, Special Deputy Attorney General. The Court, having reviewed the administrative record, having read the briefs filed by the parties, having heard oral arguments of counsel, and being fully advised in the matter, hereby renders its decision.

FACTUAL AND PRECEDURAL BACKGROUND

Around 12:30 a.m. on May 21, 2009, Nez Perce County Deputy Sheriff Joe Rodriguez was on patrol on Highway 95 in Nez Perce County when he observed a vehicle backing down the highway in the passing lane.[1] The officer pulled in behind the vehicle and activated his overhead lights. Rather than stop, the driver made a u-turn, drove across the median, then proceeded southbound. Deputy Rodriguez turned around and proceeded southbound, pulling in behind the vehicle after the driver had pulled over onto the shoulder of the highway. The deputy contacted the driver of the vehicle, later identified by his driver's license as David Ghigleri, asked why he had been backing down the highway and requested his driver's license, registration and proof of insurance. As he was talking to the driver, Deputy Rodriguez could smell a strong odor of alcohol. As he searched for the requested items, the deputy noticed Ghigleri was fumbling with his papers and his eyes were watery.

The deputy returned to his patrol vehicle with the items requested from Ghigleri and requested backup and a report on Ghigleri's driver's license status. After a second deputy arrived, Deputy Rodriguez contacted Ghigleri and asked him to step out of his vehicle. As he complied, Deputy Rodriguez noticed Ghigleri used the vehicle door to maintain his balance and that he staggered as he walked toward the rear of the vehicle. The deputy continued to smell the strong odor of alcohol as he talked to Ghigleri and asked him to perform field sobriety tests. An HGN evaluation was conducted by the deputy and Ghigleri was asked to perform a walk-and turn task, one leg stand task, counting task and alphabet task. After forming the belief that Ghigleri was unable to perform the tasks satisfactorily, Deputy Rodriguez placed him under arrest for DUI and transported him to the sheriff's annex.

[1] The facts relative to the stop and arrest of Petitioner Ghigleri were taken from Deputy Rodriguez's narrative report of the incident. The report is located in the Administrative Record as State's Exhibit 4.

After arriving at the sheriff's annex, Deputy Rodriguez checked Ghigleri's mouth for foreign objects, noted the time, and then played the CD reading of the Notice of Suspension form to Ghigleri. The deputy asked Ghigleri if he understood the notice and he stated he did not. The deputy then played the Notice of Suspension CD for Ghigleri two additional times. Deputy Rodriguez asked Ghigleri if he would provide breath samples for testing. Ghigleri asked the deputy what he would do and the deputy told him he was unable to give him any advice. Ghigleri subsequently provided a breath sample into the Intoxylizer instrument but, after seeing the test result was 0.145, he refused to provide a second sample and stated he believed the instrument was incorrect.[2] When a second breath sample was not provided within the time period allowed by the instrument, it recorded a refusal as to the second breath sample. Ghigleri was transported to the jail and turned over to jail staff after being cited for driving under the influence of alcohol.

On May 27, 2009, Ghigleri requested an administrative hearing, which was held on June 16, 2009.[3] Deputy Rodriguez was called as a witness and questioned by Ghigleri's attorney, after which oral argument was presented.[4] On July 15, 2009, the hearing officer entered his Findings of Fact, Conclusions of Law, and Order sustaining Ghigleri's driver's license suspension. On July 24, 2009, Ghigleri filed a Petition for Judicial Review. An Order for Stay Pending Judicial Review was entered by the Court.

STANDARD OF REVIEW

"A party aggrieved by the decision of the hearing officer may seek judicial review of the decision in the manner provided for judicial review of final agency action provided in chapter 52,

[2] Exhibit 2 of the Administrative Record.
[3] Exhibit 12 of the Administrative Record.
[4] Hearing Transcript filed September 17, 2009.

title 67, Idaho Code." I.C. § 18-8002A(8). "[J]udicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter, supplemented by additional evidence taken pursuant to section 67-5276, Idaho Code." I.C. § 67-5277. "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). Idaho Code Section 67-5279(3) further provides:

> (3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
>
> a) in violation of constitutional or statutory provisions;
> b) in excess of the statutory authority of the agency;
> c) made upon unlawful procedure;
> d) not supported by substantial evidence on the record as a whole; or
> e) arbitrary, capricious, or an abuse of discretion.

In an administrative hearing on a driver's license suspension, the burden of proof rests with the petitioner. Idaho Code § 18-8002A(7) states in pertinent part:

> The burden of proof shall be on the person requesting the hearing. The hearing officer shall not vacate the suspension unless he finds, by a preponderance of the evidence, that:
>
> (d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered; or
>
> (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section.
>
> If the hearing officer finds that the person has not met his burden of proof, he shall sustain the suspension.

ANALYSIS / DISCUSSION

In his Petition for Judicial Review, Ghigleri raises the following issues: (1) Did the Idaho Department of Transportation ("IDT") lack jurisdiction to hear the matter where Ghigleri failed

to submit two breath samples for testing; (2) did the officer give Ghigleri incorrect information regarding his commercial driver's license ("CDL"); (3) was Ghigleri prevented from completing his breath testing by the officer; and, (4) does the notification form fail to properly advise CDL holders of the consequences for refusing to provide evidentiary testing or of failing evidentiary testing.

(A) BREATH TESTING FOR BLOOD ALCOHOL LEVELS / JURISDICTION

Petitioner contends that when a law enforcement officer elects to utilize breath testing to determine a driver's blood alcohol level, a 'test' consists of two breath samples. In the instant matter, Petitioner agreed to perform breath testing but, after learning the first breath sample tested at 0.145 blood alcohol level ("BAC"), declined to provide a second breath sample. Petitioner argues that not providing a second breath sample resulted in a failure to complete all testing and must be treated as a complete refusal under I.C. § 18-8002A.

Idaho Code § 18-8002A is titled "Tests of driver for alcohol concentration, presence of drugs or other intoxicating substances – Suspension upon failure of tests" and reads in relevant part, " 'Evidentiary testing' means a procedure or test or series of procedures or tests utilized to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in a person, including additional testing authorized by subsection (6) of this section[5]." I.C. § 18-8002A(1)(e). Idaho Code § 18-8002A addresses the civil license suspension that may result when a police officer requests BAC testing from a driver, while I.C. § 18-8004 addresses the criminal action that may flow from BAC testing. What constitutes a BAC 'test', as that term is used in the DUI statutory scheme, was addressed in *State v. Mills*, 128 Idaho 426, 913 P.2d 1196 (Ct.App.1996).

[5] I.C. § 18-8002A(6) allows a driver to have additional testing done at the driver's expense after the driver has submitted to testing as requested by a police officer.

In *Mills*, at the request of a police officer the driver provided two breath samples for testing. At the time of Mills' arrest, it was unlawful to drive with a BAC level of 0.10 or greater. Mills was charged with DUI when the breath test results showed Mills' BAC level to be 0.10 and 0.09. Mills moved to have the charge dismissed, arguing I.C. § 18-8004(2) precluded the State from prosecuting him for DUI where he had a test result of less than 0.10. The trial court denied the motion and Mills appealed. On appeal, the State argued that what constitutes a BAC "test" is determined by the Idaho Department of Law Enforcement policy, which stated a breath test consists of at least two separate breath samples, with a third sample to be taken if the first two sample results differed by more than 0.02 BAC units. The Court disagreed.

> Idaho Code § 18-8004(2) plainly speaks of "a test," which the IDLE [Idaho State Police formerly known as Idaho Department of Law Enforcement] in turn defines as consisting of at least two separate breath samples. We find this IDLE requirement of two samples to be inconsistent with the plain language of the statute. We hold that one sample constitutes "a test," as that term is used in I.C. § 18-8004(2), and if that sample shows a BAC level below 0.10, the accused cannot be prosecuted for DUI under this statute. Furthermore, if more than one sample is taken, each valid sample constitutes a test. . . . We do not here question the authority of the IDLE to adopt standards requiring that more than one sample be taken when breath testing is performed. As stated in the policy statement attached as Appendix B to the state's brief, such a practice helps rule out "the possibility of an instrument malfunction, radio frequency interference, mouth alcohol or other rapidly fluctuating source of error which might effect a single result." However, taking two samples for quality control purposes does not permit the state to disregard one valid sample that shows an alcohol concentration of less than 0.10.
>
> For the reasons noted, we conclude that one valid sample constitutes "a test" pursuant to I.C. § 18-8004(2).

State v. Mills, 128 Idaho at 429.[6]

In the instant matter, Petitioner makes the same argument as did the State in *Mills*, contending the deciding language as to what constitutes a "test" is found in Section 1, page 22 of

[6] In 2008, the Idaho Supreme Court in *State v. Anderson*, 145 Idaho 99, 104, 175 P.3d 788 (2008) affirmatively noted the finding in *Mills* that a single result constitutes a BAC "test" within the language of the DUI statutes and, throughout its opinion, referred to the three breath sample results from Anderson as 'tests' plural, not test singular.

the Intoxilyzer 5000 Breath Testing Specialist Manual[7] compiled by the Idaho State Police, which reads.

> A breath alcohol test normally includes two (2) breath samples taken during the testing sequence separated by air blanks. The agreement of the results of two separate breath samples strongly refutes the possibility of an instrument malfunction, radio frequency interference, mouth alcohol, or other possible sources of error (see SOP III.).

Petitioner's argument is fatally flawed for the same reason it was fatally flawed in *Mills*. Language drafted by the Idaho State Police in its manuals cannot, and does not, supersede or override statutory language. A 'test' for blood alcohol content consists of a single breath sample of sufficient quantity to allow the Intoxilyzer instrument to quantify an individual's blood alcohol level. This is consistent with the language in I.C. § 18-8002A(1)(e), which defines evidentiary testing as a procedure or test (singular) or series of procedures or tests (plural) utilized to determine the concentration of alcohol in a person.[8] To find otherwise would create a legal absurdity as a driver could submit one breath sample and, after learning he had failed the test, could prevent the police from collecting evidence by simply refusing to provide a second breath sample. While the SOP developed by the Idaho State Police strongly encourages the taking of two breath samples for quality control purposes, the language in the manual stating, "A breath alcohol test *normally* includes two (2) breath samples", though not particularly well drafted, is not inconsistent with the statutory language nor is it at odds with the Court's finding in *Mills*.

Contrary to the position asserted by Petitioner, the Idaho Department of Transportation had jurisdiction to hear Petitioner's driver's license matter. Petitioner completed and failed a

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[7] Attached to Petitioner's Reply Brief filed November 25, 2009. The Court notes for the record that Petitioner cites to language within the Standard Operating Procedures manual ("SOP") to support his position. However, the SOP manual was not made part of the record in this case.

[8] I.C. § 18-8002A(3)(b) provides that a breath test as defined in I.C. § 18-8004 is valid for purposes of I.C. § 18-8002A.

BAC breath test prior to refusing to complete a second breath test as requested by the officer and therefore, he did not refuse evidentiary testing as that term is used within the language of I.C. § 18-8002A.

Petitioner further asserts he was prevented from taking the second requested breath test by the officer. It was the finding of the hearing officer that the record did not support Petitioner's position on this issue. The Court finds there is sufficient evidence in the record to support the hearing officer's finding.

Exhibit D to the Administrative Record is a transcript of the audio recording of the conversation between Deputy Rodriguez and Petitioner at the expiration of the fifteen minute observation period required just prior to a driver providing breath samples. The officer explained to Petitioner that the Intoxilyzer instrument will automatically 'time out' if a breath sample is not received after a set amount of time. Petitioner, however, continued to ask the officer whether it would be better for him to take the test or refuse. Deputy Rodriguez told Petitioner he could not advise him about what he should do, he could only explain to him that the instrument would record a refusal for the second breath test once the instrument 'timed-out'. Petitioner then decided to provide a breath sample but, after learning the test result indicated he had a BAC level of 0.145, he refused to provide a second sample for testing. Once the Intoxilyzer instrument 'timed-out' after a second breath sample was not provided, the officer told Petitioner it was time to move on to the booking process as he had given Petitioner more than sufficient time to decide whether he wanted to provide a second breath sample. Petitioner failed to show that the officer in any way prevented him from completing the second breath test that was requested.

(B) NOTICE REGARDING SUSPENSION

Petitioner contends he was not properly informed as to the potential consequences refusing to submit to or failing to pass evidentiary testing would have on his CDL status.

> Idaho Code section 18-8002A requires that upon being asked to submit to a BAC a motorist must be given information regarding the consequences of submitting to and failing the BAC, by having a blood alcohol content that exceeds the legal limit. I.C. § 18-8002A(2). Specifically, motorists must be informed, among other things, that if they submit to and fail a BAC, a civil license suspension will be enforced against them. I.C. § 18-8002A(2). Motorists are entitled to similar information regarding the consequences of refusing to submit to a BAC. I.C. § 18-8002(3).
>
> [A]ccording to I.C. § 18-8002A(2), the motorist '"need not be informed verbatim;" rather, he or she need only be "substantially" informed of the information contained in that section.

In the Matter of Halen, 136 Idaho 829, 834, 41 P.3d 257 (2002).

The *Halen* Court acknowledged that I.C. § 18-8002A(2) lists specific information that must be provided to a driver when evidentiary testing is requested, but noted the statute specifically states that a driver must be substantially informed regarding the statutory information, not informed verbatim. In the instant matter, the hearing officer found Petitioner was properly informed as required by I.C. § 18-8002A(2).

Petitioner does not argue that the information provided to him by way of the written Advisory Form and the recorded reading of the form failed to provide any of the information listed in I.C. § 18-8002A(2). Rather, he contends he was not provided information specific to the consequences of a refusal or failure of testing on his CDL status.[9] Petitioner further asserts that, in regards to CDL status, the arresting officer gave him incorrect information regarding the

[9] "Any person who operates a commercial motor vehicle or who holds a class A, B or C driver's license is disqualified from operating a commercial motor vehicle for a period of not less than one (1) year if the person refuses to submit to or submits to and fails a test to determine the driver's alcohol, drug or other intoxicating substances concentration while operating a motor vehicle." I.C. § 49-335(2).

consequences of refusing or failing evidentiary testing, thus invalidating any information otherwise correctly provided.

The oral exchange between the arresting officer and Petitioner was captured on audio tape, which was partially transcribed and made part of the administrative record.[10] The transcribed portion of the exchange begins after Petitioner had been provided three readings of the 18-8002A suspension advisory form. Petitioner, clearly in a quandary as to whether he should perform breath testing, presses the officer for advice. After the officer tells Petitioner he cannot advise him, Petitioner appears to agree to provide breath samples for testing and the officer explains how to blow into the testing instrument.

After the first breath sample is provided, Petitioner asks the officer about the result. The officer tells Petitioner he tested 0.145 and tells him the instrument is ready for a second breath sample. Petitioner tells the officer the test result has to be wrong and he will not provide a second sample for testing. The officer says okay and explains he needs to wait for the testing instrument to "time out", which will result in the second test showing as a refusal on the printout. Petitioner asks the officer, "Does this take away my right to have a CDL?" to which the officer responds, "I don't know, I've seen people that have been convicted or that have a CDL . . . DUI." Again the Petitioner asks the officer to help him decide "the best road for me". The officer then tells him he has already given a breath sample. Petitioner continues to implore the officer for advice, telling him he cannot afford to lose his CDL as he will lose his job. The following exchange then occurs.

> Officer: Yea, it's part of the court proceedings, ok. It's part of the court proceedings on that you know. By taking and giving the breath sample which you know now it's too late, there's ways that you work with it, I mean possibly your attorney you know I mean may . . . I'm sure you're going to get a decent attorney. You're not gonna have someone you know just show up off the street.

[10] Exhibit D to the administrative record, bates stamped as 058 through 062.

> Petitioner: Well sure. Here's the deal. If I refuse I lose, I'm gone for a year. There's no way, they, I'm fired, so I don't know. I tried to understand this as best I could and do definitely want to go down the right road.

Exhibit D to the administrative record.

At that point the officer tells Petitioner he understands but that it's time to move on and he proceeds to provide Petitioner with his *Miranda* rights. Petitioner tells the officer he doesn't understand, he just doesn't know what to do and he still has questions. The officer tells Petitioner that particular part of the evaluation is over, he blew a 0.145, refused to give a second breath sample, the instrument had timed-out and they are now beyond that part. Petitioner then asks which way would mean he would not go to jail. The officer correctly informs him that either way he goes to jail unless he had tested less than 0.08, which would have meant getting him back to his vehicle and on his way home. Petitioner then asks the officer if he flunked or passed and the officer tells him he did not pass because he blew 0.145 and refused the second test. The officer, in response to Petitioner's question as to the impact of one test and one refusal, tells the Petitioner he does not know because he had never had that situation. The officer then tells Petitioner that the form he was completing asks if the driver failed or refused and, since Petitioner had provided one breath sample and failed, he was giving him a yellow sheet that would be his driving permit but the officer would be keeping his actual license.[11] The officer read Petitioner his *Miranda* rights, Petitioner said he did not want to answer any questions, the officer said okay then handcuffed Petitioner and took him to the jail area.

When the exchange is read as a whole, it is clear the arresting officer did not provide Petitioner with incorrect information. For the most part, the officer provided no information.

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[11] Petitioner argues in brief that he had no way of knowing whether his test was treated as a refusal wherein he would need to seek a hearing before a magistrate within seven days, or as a failed test wherein he would need to request an administrative hearing within seven days. Petitioner's argument is without merit as he was provided a temporary driving permit which, as stated on the notification form given to Petitioner, an officer may only do if the driver does BAC testing and the results are 0.08 or greater.

The officer consistently treated the situation in the manner prescribed for a failed test[12], not a refusal, and he repeatedly told the Petitioner he had never had a situation where a driver provided one breath sample and then refused to provide a second so he did not know how the court would treat the situation or how it might affect Petitioner's CDL status. Petitioner contends the officer told him he had seen drivers with DUI charges keep their CDL. The record, however, does not support Petitioner's contention. First, the transcript shows the officer's response was unintelligible. Secondly, even assuming the officer said he had seen drivers convicted of DUI who held a CDL, it would not have been an inaccurate statement as a single DUI conviction does not result in a lifetime CDL disqualification.[13] Therefore, the hearing officer's finding that the officer did not provide incorrect information to the Petitioner is supported by the record.

Finally, the Court must determine whether the hearing officer was correct in finding the notification of suspension provided to the Petitioner was statutorily sufficient where Petitioner held a CDL.[14] The written suspension advisory[15], which was read to Petitioner three times by means of an audio recording, informed Petitioner that the law required him to take one or more evidentiary tests to determine his blood alcohol content. The notification informed Petitioner that: (1) if he refused to submit to evidentiary testing a refusal would result in a one (1) year absolute suspension of his driving privileges and, (2) if he refused or failed to complete requested testing, his driver's license would be seized, he would receive a temporary driver's license but that a temporary license would not be valid for commercial driving privileges if a commercial motor vehicle was being driven at the time of the arrest. The notice informed Petitioner that he had seven (7) days to request a hearing regarding any suspension for refusing

[12] The written Suspension Advisory is completed on the bottom portion consistent with a failed evidentiary test, wherein the driver is provided a temporary permit. Had the officer treated the situation as a refusal, no temporary permit would have been issued. See Exhibit 1 to the administrative record.
[13] 49 CFR § 383.51 and I.C. § 49-335.
[14] Petitioner held a Class A commercial driver's license (I.C. § 49-105(16)(a)).
[15] Exhibit 1 of the administrative record.

or failing to complete evidentiary testing but that if no hearing was requested or he did not prevail at a hearing, his driver's license would be absolutely suspended for one (1) year if it was his first refusal and for two (2) years if it was his second refusal within ten (10) years. The notice then advised that if Petitioner underwent evidentiary testing but failed the test, his driving privileges would be suspended for ninety (90) days if it was a first failure, with the first thirty (30) days being an absolute suspension, and that restricted driving privileges could be requested for the remaining sixty (60) days but no commercial driving privileges were available during the restricted driving period. The suspension advisory form does not include notice that under I.C. § 49-335(2), any person holding a Class A, B or C driver's license is "disqualified" from operating a commercial motor vehicle for a period of not less than one (1) year if the person refuses to submit to or fails testing to determine the driver's alcohol, drug or other intoxicating substance concentration while operating a motor vehicle.

Idaho Code § 18-8002A(2) mandates the information that must be given at the time evidentiary testing for the concentration of alcohol or other intoxicating substances is requested from a driver.[16] Nothing within the statutory section requires drivers to be notified that refusing

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[16] I.C. § 18-8002A(2) reads:

Information to be given. At the time of evidentiary testing for concentration of alcohol, or for the presence of drugs or other intoxicating substances is requested, the person shall be informed that if the person refuses to submit to or fails to complete evidentiary testing, or if the person submits to and completes evidentiary testing and the test results indicate an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code, the person shall be informed substantially as follows (but need not be informed verbatim):

If you refuse to submit to or if you fail to complete and pass evidentiary testing for alcohol or other intoxicating substances:

(a) The peace officer will seize your driver's license and issue a notice of suspension and a temporary driving permit to you, but no peace officer will issue you a temporary driving permit if your driver's license or permit has already been and is suspended or revoked. No peace officer shall issue a temporary driving permit to a driver of a commercial vehicle who refuses to submit to or fails to complete and pass an evidentiary test;

(b) You have the right to request a hearing within seven (7) days of the notice of suspension of your driver's license to show cause why you refused to submit to or to complete and pass evidentiary testing and why your driver's license should not be suspended;

(c) If you refused or failed to complete evidentiary testing and do not request a hearing before the court or do not prevail at the hearing, your driver's license will be suspended. The suspension will be for one (1) year if this is your first refusal. The suspension will be for two (2) years if this is your second refusal within ten (10) years. You will not be able to obtain a temporary restricted license during that period;

to submit to evidentiary testing or submitting but failing testing will "disqualify" the holder of a commercial driver's license from operating a commercial vehicle for at least one (1) year. Idaho's appellate courts have not addressed whether all consequences for refusing or failing evidentiary testing for alcohol content or other intoxicating substances must be provided before suspension of a driver's license may be enforced. Other jurisdictions have addressed the general issue, though the Court found no case precisely on point. Nevertheless, the general analysis made by other courts, in particular Wyoming, is persuasive on the notice issue.[17]

The Wyoming Supreme Court recently addressed the issue of license suspension notification and CDL holders in *Escarcega v. Wyoming Department of Transportation*, 153 P.3d 264 (Wyo.2007), albeit in the context of a refusal. Wyoming and Idaho have substantially identical implied consent statutes and both states statutorily mandate specific information that must be provided to drivers regarding the consequences of refusing or failing evidentiary testing upon an arrest for DUI.[18] The notification statutes, while distinguishable as to specifics, are substantially the same for purposes of the current analysis.

(d) If you complete evidentiary testing and fail the testing and do not request a hearing before the department or do not prevail at the hearing, your driver's license will be suspended. This suspension will be for ninety (90) days if this is your first failure of evidentiary testing, but you may request restricted noncommercial vehicle driving privileges after the first thirty (30) days. The suspension will be for one (1) year if this is your second failure of evidentiary testing within five (5) years. You will not be able to obtain a temporary restricted license during that period;

(e) If you become enrolled in and are a participant in good standing in a drug court approved by the supreme court drug court and mental health court coordinating committee under the provisions of chapter 56, title 19, Idaho Code, you shall be eligible for restricted noncommercial driving privileges for the purpose of getting to and from work, school or an alcohol treatment program, which may be granted by the presiding judge of the drug court, provided that you have served a period of absolute suspension of driving privileges of at least forty-five (45) days, that an ignition interlock device is installed on each of the motor vehicles owned or operated, or both, by you and that you have shown proof of financial responsibility; and

(f) After submitting to evidentiary testing you may, when practicable, at your own expense, have additional tests made by a person of your own choosing.

[17] Other cases the Court found helpful in making its analysis are *Cuthbertson v. Kansas Department of Revenue*, 2009 WL 4421263 (Kan.App. 2009) and *Chancellor v. Dozier*, 658 S.E.2d 592, 283 Ga. 259 (Ga. 2008).

[18] Idaho has a single implied consent statute while Wyoming has chosen to enact two nearly identical implied consent statutes, one for drivers of non-commercial vehicles and one for drivers of commercial vehicles.

I.C. § 18-8002 reads in relevant part, "Any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol as defined in section 18-8004, Idaho Code, and to have given his consent to evidentiary testing for the presence of drugs or other intoxicating substances, provided that such testing is administered at the request of a peace officer having reasonable

Like Petitioner, Escarcega held a CDL but was operating a non-commercial vehicle when he was arrested for DUI.[19] The arresting officer provided Escarcega with the statutory notification information required under Wyoming's notification statute for non-commercial vehicle drivers, but did not inform him regarding consequences relative to his CDL. Escarcega refused testing, his license was suspended and he subsequently requested an administrative hearing where he asserted his license should not be suspended because the officer had failed to warn him of the prospect of disqualification of his CDL. The suspension was upheld by an administrative hearing officer and by the district court on appeal. Escarcega then appealed to the Wyoming Supreme Court. The Wyoming Court, finding no ambiguity in the statute mandating the specific warnings to be given drivers of non-commercial vehicles, found the legislature did not choose to require warnings regarding potential CDL disqualification.[20] The Wyoming Court stated,

> It would be impractical to require that an arresting officer convey all the information in both statutory schemes to an arrestee before requesting a specimen for chemical testing. The implied consent and various driver's license statutes contain multiple interrelated provisions for penalties that may be heightened or vary according to the circumstances of each violation. To require a detailed recitation of all statutory penalties involved in a traffic stop would be a misuse of law enforcement resources and would not serve the purpose of the implied consent statutes. The implied consent law was intended as a complement to the DWUI statute and was designed to facilitate tests for

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grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of the provisions of section 18-8004, Idaho Code, or section 18-8006, Idaho Code."

Wyo.Stat. § 31-6-102(a)(i) reads in relevant part, "Any person who drives or is in actual physical control of a motor vehicle upon a public street or highway in this state is deemed to have given consent, subject to the provisions of this act, to a chemical test or tests of his blood, breath or urine for the purpose of determining the alcohol concentration or controlled substance content of his blood."

Wyo. Stat. § 31-7-307(a) reads in relevant part, "A person who drives or is in actual physical control of a commercial motor vehicle within this state is deemed to have given consent, subject to the provisions of this section to a chemical test or tests of his blood, breath or urine for the purpose of determining alcohol or controlled substance concentration in his blood.".

[19] Wyoming uses the acronym DWUI for driving while under the influence.

[20] Under Wyoming law, a separate statute addresses the potential for disqualification of CDL status for refusal or failure of evidentiary testing for DUI. Wyo. Stat. § 31-7-307. In Idaho, I.C. § 49-335 addresses disqualification of CDL status for refusal or failure of evidentiary testing for DUI, as well as a number of other offenses that may result in disqualification. I.C. § 49-335 is referenced in I.C.§ 18-8005, the penalties portion of Idaho's DUI statutes, but has not been made part of I.C. § 18-8002A(2), the mandatory notification portion of Idaho's DUI statutes.

> intoxication, not to inhibit the ability of the state to keep drunk drivers off the road. *Chastain,* 594 P.2d at 461.
>
> Implied consent is, by nature, *implied* in law. Merely by choosing to drive a motor vehicle on the roads of this state, a driver agrees to submit to chemical testing in the event of his arrest for DWUI. The consequences for refusing [or failing] a chemical test are published law, of which every citizen is presumed to have knowledge. *See Cheek v. United States,* 498 U.S. 192, 199, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991). The Legislature has created a few limited exceptions to that rule by requiring that specific warnings be given to drivers in certain situations before penalties can be imposed. Appellant here was given the precise warning required by the applicable statutes for a driver stopped in a non-commercial vehicle. He was entitled to no more and no less.

Escarcega v. Wyoming Department of Transportation, 153 P.3d 264, 270 (Wyo.2007).

The DUI statutory scheme enacted by Idaho's legislature, like that of Wyoming's, contains "multiple interrelated provisions for penalties that may be heightened or vary according to the circumstances of each violation." Idaho Code § 49-335, which provides for disqualification and penalties relative to commercial driver's licenses, is referenced within I.C. § 18-8005 of Idaho's DUI statutory scheme. However, the legislature chose not to reference I.C. § 49-335 within the mandatory notice provision provided in I.C. § 18-8002A(2). This Court finds the reasoning of the Wyoming Court sound. Idaho's legislature set forth in I.C. § 18-9002A(2) the specific consequences a driver must be informed about prior to a law enforcement officer's request that a driver perform evidentiary testing subject to a DUI arrest. While the notification may not cover all potential consequences of refusing to submit to evidentiary testing or of failing evidentiary testing, it is all that Idaho's legislature has required, no more and no less. If this Court found that more was required than has been set forth by the legislature, barring a constitutional ground, it would be tantamount to the Court making law. Courts have the power to interpret law, not to make law. The power to make law rests instead with the legislature. *Electrical Wholesale Supply Co. v. Nielson,* 136 Idaho 814, 825, 41 P.3d 242 (2001).

In the instant matter, the hearing officer found the arresting officer told Petitioner he did not know what impact refusing or failing evidentiary testing would have on his CDL and, therefore, the officer did not incorrectly inform Petitioner of the consequences to his CDL status. Regarding the sufficiency of the suspension notification, the hearing officer found I.C. § 18-8002A(2) does not require an officer to notify a driver regarding any consequences refusal or failure of evidentiary testing will have on a driver's Class A driver's license. The record supports the hearing officer's findings.

(C) DUE PROCESS

Petitioner contends the holder of an Idaho Class A commercial driver's license is deprived of procedural due process under the administrative procedures scheme established for a driver's license suspension. However, Petitioner has presented the Court with no basis in law that supports his position and, at least in part, his claim is not yet ripe.

Commercial driver's licenses (CDL) are regulated by, and are the creation of, federal law. Pursuant to federal law, no State may issue CDL's without certification of compliance with all applicable federal regulations and statutory requirements.[21] Holders of CDL's are required by federal regulation to report all motor vehicle violations and license suspensions to his/her employer and to the licensing State or jurisdiction if the violation occurs outside the issuing State or jurisdiction.[22] In addition to the self-reporting requirements, employers of persons required to have CDL's have certain federal regulatory responsibilities.[23]

In compliance with federal law, Idaho has enacted certain statutes and regulations applicable to commercial driver's licenses, including I.C. § 49-335, which provides for the disqualification of CDL status for refusing or failing evidentiary testing for alcohol, drugs or

[21] See 49 C.F.R. § 383.23, 49 C.F.R. § 383.405 and Appendix C (at p. 25) to Respondent's brief filed November 13, 2009.
[22] 49 C.F.R. §§ 383.31, 383.33, 383.35.
[23] 49 C.F.R. §§ 382, et seq.

other intoxicating substances.[24] Pursuant to I.C. § 49-326, the Idaho Department of Transportation must notify a licensee that the department has deemed him disqualified from CDL status, after which the licensee may request an administrative hearing.

The suspension of a driver's license under I.C. § 18-8002A and the disqualification of CDL status under I.C. § 49-335 are clearly two separate and distinct procedures. In the instant matter, pursuant to I.C. § 18-8002A(7) Petitioner requested and was afforded a hearing on the suspension of his driver's license. There is, however, no evidence in the record that Petitioner has yet been notified that he has been deemed disqualified from holding a commercial driving enhancement to his driver's license pursuant to I.C. § 49-335. Once that notification is received, Petitioner has a statutory right to request a hearing under I.C. § 49-326.

The deprivation of the continued possession of a driver's license is subject to the due process requirements under the Fourteenth Amendment to the United States Constitution. *State v. Quenzer*, 112 Idaho 756, 757, 735 P.2d 1067 (Ct.App.1987).

> "Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions." *Cowan v. Board of Comm'rs,* 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006). "[A]n individual must be provided with notice and an opportunity to be heard." *Spencer v. Kootenai County,* 145 Idaho 448, 454, 180 P.3d 487, 493 (2008). Due process is not a rigid concept. Instead, the protections and safeguards necessary vary according to the situation. *Aberdeen-Springfield Canal Co. v. Peiper,* 133 Idaho 82, 91, 982 P.2d 917, 926 (1999).

Meyers v. Hansen, 2009 WL 4093782.

Idaho's Supreme Court, recognizing the State's strong interest in preventing intoxicated persons from driving and, that the need to avoid overly burdensome procedures outweighs a driver's interesting in maintaining his license, has deemed a prompt post-suspension hearing adequate to meet due process requirements. *In re Driver's License Suspension of Gibbar*, 143 Idaho 937, 946, 155 P.3d 1176 (Ct.App.2006). In the instant case, Petitioner received

[24] I.C § 49-335.

notification that his driver's license was suspended and he requested and received a hearing. Therefore, there was no violation of his Fourteenth Amendment due process rights relative to his driver's license suspension. As to any disqualification from CDL status, the due process requirements of notice and a right to be heard are provided for by statute. The Department of Transportation, upon finding Petitioner disqualified from holding CDL status under I.C. § 49-335, must provide Petitioner notice and an opportunity to be heard.[25] However, the procedural due process that must be afforded Petitioner regarding disqualification has not yet been triggered as there is no evidence in the record that the Department of Transportation has deemed Petitioner disqualified from CDL status. Therefore, Petitioner's argument that he has been deprived of due process regarding his CDL status is not timely.

Finally, Petitioner makes a passing argument that disqualification of his CDL status under I.C. § 49-335 violates substantive due process rights and equal protection rights under the constitution.

> The rational relationship test is applied under both the substantive due process clause and the equal protection clause in determining the constitutionality of a law that does not deal with a fundamental right. *Cecelia Packing Corp. v. U.S. Dept. of Agriculture/Agricultural Mktg. Serv.*, 10 F.3d 616 (9th Cir.1993). "Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a 'clear showing of arbitrariness and irrationality.' " *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir.1994). Moreover, "in a substantive due process challenge, we do not require that the [government's] legislative acts actually advance its stated purposes, but instead look to whether " 'the governmental body *could* have had no legitimate reason for its decision.' " " *Id.* Additionally, "[i]f it is 'at least fairly debatable' that the [government's] conduct is rationally related to a legitimate governmental interest, there has been no violation of substantive due process." *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir.1994) (quoting *Kawaoka*, 17 F.3d at 1234).

State v. Bennett, 142 Idaho 166, 171, 125 P.2d 522 (2005).

[25] The holder of a CDL has a right to notice and a hearing regarding the civil driver's license suspension under I.C. § 18-8002A(7) and a separate right to notice and a hearing on the issue of CDL disqualification under I.C. § 49-326.

Petitioner concedes in briefing that the test to apply is the rational relationship test. More importantly, Petitioner cites the Court to no law in support of his bare contention that there is no rational basis for disqualifying a driver from holding a CDL when the driver refuses or fails BAC testing upon an arrest for DUI. Idaho has long recognized the strong public interest in keeping its roadways safe and free of intoxicated drivers who pose a risk to themselves and others. Therefore, there is no violation of substantive due process rights or equal protection rights as there is a rational relationship between disqualification of CDL status and the State's interest in keeping Idaho's roadways safe.

ORDER

The Order of the Hearing Officer entered on July 15, 2009, sustaining the license suspension of David B. Ghigleri is hereby AFFIRMED.

The Order of the Court staying imposition of the suspension is hereby LIFTED. The period of suspension Ordered by the Department of Transportation shall begin January 20, 2010 and run for the length of time ordered pursuant to statute.

Dated this 13 day of January 2010.

JEFF M. BRUDIE, District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION & ORDER was:

✓ hand delivered via court basket, or Messenger Service

_____ mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 13th day of January, 2010, to:

Charles M. Stroschein
PO Drawer 285
Lewiston, ID 83501

Edwin L. Litteneker
PO Box 321
Lewiston, ID 83501

PATTY O. WEEKS, CLERK

By: _____
Deputy

AUDITOR AND RECORDER